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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 ANDRE F. LESLEY,) Case No. CV 18-8868 CAS(JC)
12 Petitioner,)
13 v.) MEMORANDUM OPINION AND
14) ORDER DISMISSING ACTION
15 SUPERIOR COURT OF THE)
16 STATE OF CALIFORNIA, etc.,)
17 et al.,)
18 Respondents.)
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20 **I. BACKGROUND AND SUMMARY**

21 On October 4, 2018, petitioner signed a document entitled “Petition for Writ
22 of Mandate/Prohibition ([Cal.] Code of Civil Procedure Section[s] 1085-86, et
23 seq.)[,],” which was formally filed on October 15, 2018 as a Petition for Writ of
24 Habeas Corpus by a Person in State Custody in the instant action (“Petition”).
25 Although not a model of clarity, the Petition was liberally construed to challenge
26 the state court’s refusal to resentence petitioner in Los Angeles County Superior
27 Court Case No. BA176320 pursuant to Proposition 36¹ and Proposition 47.²

28 ¹Proposition 36, also known as the Three Strikes Reform Act of 2012, which was enacted
on November 6, 2012, and became effective the following day, modified California’s Three

(continued...)

1 On November 30, 2018, the Magistrate Judge issued an Order to Show
2 Cause (“OSC”) which advised petitioner that the Petition was deficient for reasons
3 described in the OSC, directed petitioner to show cause why the Petition should
4 not be dismissed based upon such deficiencies, afforded petitioner leave to file a
5 first amended petition for writ of habeas corpus, and directed the Clerk to provide
6 petitioner with a blank current Central District habeas petition form for petitioner’s
7 use.³ The OSC further expressly advised petitioner that the failure timely to
8 respond thereto may result in the dismissal of the Petition based upon the
9 referenced deficiencies and/or the dismissal of this action based upon petitioner’s
10 failure to comply with the OSC and/or his failure to prosecute.

11 Although the deadline to respond to the OSC expired more than two weeks
12 ago – on December 14, 2018 – petitioner has not responded thereto. Nor has
13 petitioner filed a first amended petition, or otherwise communicated with the Court
14 since the issuance of the OSC.

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17 ¹(...continued)
18 Strikes Law, codified at California Penal Code sections 667 and 1710.12, as it applies to certain
19 third-strike indeterminate sentences. See Cal. Penal Code § 1170.126.

20 ²Proposition 47, also known as the Safe Neighborhoods and Schools Act, which was
21 enacted on November 4, 2014, and became effective the following day, created a new
22 resentencing provision, California Penal Code section 1170.18, under which certain individuals
23 may petition the superior court for a recall of sentence and request resentencing. See Cal. Penal
24 Code § 1170.18.

25 ³Specifically, the Magistrate Judge advised petitioner, albeit in greater detail and with
26 citation to authorities, that the Petition is deficient in the following respects: (1) it has not been
27 submitted on either the national form appended to the current Rules Governing Section 2254
28 Cases in the United States District Courts (“Habeas Rules”) or the form currently approved by
the Central District of California for habeas petitions; (2) it does not name a proper respondent;
(3) petitioner’s claims are not framed as federal constitutional claims and instead appear to
challenge state law sentencing determinations which are not cognizable on federal habeas
review; and (4) to the extent petitioner is seeking a writ of mandamus rather than a writ of
habeas corpus, the Court does not have jurisdiction to issue a writ of mandamus to compel
respondents – non-federal entities – to take the action requested by petitioner.

1 As discussed below, this action is dismissed due to petitioner’s unreasonable
2 failure to prosecute and petitioner’s failure to comply with the OSC.

3 **II. PERTINENT LAW**

4 It is well-established that a district court may *sua sponte* dismiss an action
5 where a plaintiff has failed to comply with a court order and/or unreasonably failed
6 to prosecute. See Link v. Wabash Railroad Co., 370 U.S. 626, 629-33 (1962);
7 Ferdik v. Bonzelet, 963 F.2d 1258, 1260 (9th Cir.) (as amended), cert. denied, 506
8 U.S. 915 (1992); see also McKeever v. Block, 932 F.2d 795, 797 (9th Cir. 1991)
9 (district court may *sua sponte* dismiss action “only for an unreasonable failure to
10 prosecute”) (citations omitted); see also Edwards v. Marin Park, Inc., 356 F.3d
11 1058, 1065 (9th Cir. 2004) (*sua sponte* dismissal pursuant to Fed. R. Civ. P. 41(b)
12 proper sanction in cases where a plaintiff is notified of deficiencies in complaint
13 and is given “the opportunity to amend [the complaint] or be dismissed” but the
14 plaintiff “[does] *nothing*”) (citations omitted; emphasis in original).⁴

15 In determining whether to dismiss an action for failure to prosecute or
16 failure to comply with court orders, a district court must consider several factors,
17 namely (1) the public’s interest in expeditious resolution of litigation; (2) the
18 court’s need to manage its docket; (3) the risk of prejudice to defendant/
19 respondent; (4) the public policy favoring disposition of cases on their merits; and
20 (5) the availability of less drastic alternatives. See In re Eisen, 31 F.3d 1447, 1451
21 (9th Cir. 1994) (failure to prosecute); Ferdik, 963 F.2d at 1260-61 (failure to
22 comply with court orders).

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26 ⁴Pursuant to Rule 12 of the Habeas Rules, the Federal Rules of Civil Procedure, to the
27 extent they are not inconsistent with any statutory provisions or the Habeas Rules, may be
28 applied to habeas proceedings. Applying Rule 41(b) of the Federal Rules of Civil Procedure
(and its attendant interpretative case law) to this habeas proceeding is not inconsistent with the
Habeas Rules or any statutory provision.

Dismissal is appropriate under the foregoing analysis “where at least four factors support dismissal . . . or where at least three factors ‘strongly’ support dismissal.” Hernandez v. City of El Monte, 138 F.3d 393, 399 (9th Cir. 1998) (citations omitted). Where a plaintiff is proceeding *pro se*, however, the court must first notify the plaintiff of the deficiencies in the complaint so that the plaintiff has an opportunity “to amend effectively.” Ferdik, 963 F.2d at 1261 (citation omitted). In addition, where a Magistrate Judge originally dismissed the complaint with leave to amend, the District Judge must review that decision before dismissing the entire action. See McKeever, 932 F.2d at 797 (“While the magistrate can dismiss complaints with leave to amend, the district court necessarily must review that decision before dismissing the entire action.”). A district judge may not dismiss an action for failure to comply with a court order (*e.g.*, the Magistrate Judge’s order to file an amended pleading) or for unreasonable failure to prosecute if the initial decision to dismiss a complaint was erroneous. Yourish v. California Amplifier, 191 F.3d 983, 992 (9th Cir. 1999) (citing *id.*).

III. DISCUSSION AND ORDERS

First, the Court has reviewed the OSC, agrees with the OSC, and finds that the OSC was properly issued for the reasons discussed therein.

Second, petitioner has been notified that the Petition is deficient in multiple respects, has been granted leave to file a proper first amended petition and has been afforded the opportunity to show good cause why dismissal of the Petition and this action would not be appropriate. Petitioner has not done so.

Finally, upon consideration of the five factors noted above, the Court finds that petitioner’s unreasonable failure to prosecute his case and failure to comply with the OSC warrants dismissal. The first two factors – the public’s interest in expeditiously resolving this litigation and the Court’s interest in managing the docket, weigh in favor of dismissal. The Court cannot hold this case in abeyance

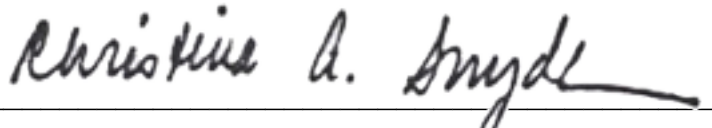
1 indefinitely awaiting petitioner's response to the Court's directive. The third
2 factor, risk of prejudice to respondents, also weighs in favor of dismissal since a
3 presumption of injury arises from the occurrence of unreasonable delay in
4 prosecuting an action. Anderson v. Air West, Inc., 542 F.2d 522, 524 (9th Cir.
5 1976). The fourth factor, the public policy favoring disposition of cases on their
6 merits, is greatly outweighed by the factors in favor of dismissal discussed herein.
7 Finally, as petitioner has already been cautioned of the consequences of his failure
8 to prosecute and his failure to comply with the OSC, has been afforded the
9 opportunity to do so, and has not responded, no sanction lesser than dismissal
10 without prejudice is feasible.

11 IT IS THEREFORE ORDERED that this action is dismissed without
12 prejudice based upon petitioner's unreasonable failure to prosecute and his failure
13 to comply with the OSC, and that judgment be entered accordingly.

14 IT IS FURTHER ORDERED that the Clerk serve a copy of the instant
15 Memorandum Opinion and Order Dismissing Action and the judgment on
16 petitioner and any respondent who has appeared in this action.

17 IT IS SO ORDERED.

18 DATED: 1/8/2019

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21 HONORABLE CHRISTINA A. SNYDER
22 UNITED STATES DISTRICT JUDGE
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